Federal Court of Appeal  Cour d'appel fédérale

Date: 20130410

Docket: A-326-12

Citation: 2013 FCA 96

CORAM: **EVANS J.A.**
DAWSON J.A.
STRATAS J.A.

BETWEEN:

THE OWNERS AND ALL OTHERS INTERESTED IN THE SHIP "MERCURY XII", MERCURY LAUNCH & TUG LTD. and NEIL PATERSON

Appellants

and

THE OWNERS AND ALL OTHERS INTERESTED IN THE BARGE "MLT-3" also known as the "BELL COPPER NO. 3", WELLS FARGO EQUIPMENT FINANCE COMPANY, C & C MACHINE MOVERS AND WAREHOUSING INC. and COSULICH GROUP INVESTMENTS INC.

Respondents

Heard at Vancouver, British Columbia, on February 6, 2013.

Judgment delivered at Ottawa, Ontario, on April 10, 2013.

REASONS FOR JUDGMENT BY: EVANS J.A.

CONCURRED IN BY: DAWSON J.A.
STRATAS J.A.

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REASONS FOR JUDGMENT

EVANS J.A.

Introduction

[1] This is an appeal from a decision of Justice Hughes (Judge) of the Federal Court (2012 FC 738) by the owners and all others interested in *Mercury XII* (Tug), Mercury Launch & Tug Ltd. (Mercury), and Neil Patterson, the captain of the Tug. The Judge held the appellants jointly and

severally liable in negligence to C & C Machine Movers and Warehousing Inc. (C & C) when, on December 4, 2007, a truck (Truck) that it was leasing toppled off a barge (Barge) being towed by the Tug. The Judge found Mercury liable in the tort of negligence for 90% of the loss, and C & C contributorily negligent for 10%. On this basis, he awarded C & C damages of $137,864 and interest at the prevailing bank rate.

[2] Mercury's only ground of appeal is that the Judge should have dismissed C & C's action because it was out of time. C & C had instituted its action on December 2, 2009, two years less two days after the loss of the Truck, well within the normal time-limit, but outside the one-year limitation period prescribed by the Hague-Visby Rules (HVR), an international convention relating to the carriage of goods by water. The HVR have the force of law in Canada by virtue of subsections 43(1) and (2) of the *Marine Liability Act*, S.C. 2001, c. 6 (Act).

[3] The Judge held that the HVR did not apply to the contract under which the Truck was on the Barge before it fell off and, as a result, C & C's action was not time-barred.

[4] The question to be decided in this appeal is whether the HVR apply on the facts of this case by virtue of subsection 43(2) of the Act. I agree with the Judge that they do not, although not for the reasons that he gave. Accordingly, I would dismiss the appeal with costs.

Factual background

[5] The facts relevant to this appeal are not complicated and are substantially undisputed. Brian White was building a house on Gambier Island in Howe Sound, north of Vancouver, and needed to have building materials transported from the mainland to the construction site.

[6] He contracted with C & C to supply a truck and driver to bring the materials from a lumber yard to a barge at Horseshoe Bay, load them onto the barge, unload them from the barge after they had docked at Brigade Bay on Gambier Island, and carry them by land from Brigade Bay to the construction site.

[7] Mr White also contracted with Mercury to transport the building materials by water from Horseshoe Bay on the mainland to Brigade Bay. They also agreed that a C & C truck would be on board the barge on the outward voyage to Gambier Island, and on the return trip to Horseshoe Bay. Mercury was the owner of the Tug and the bareboat charterer of the Barge, the vessels used for transporting the building materials and the Truck from Horseshoe Bay to Brigade Bay and, in the case of the Truck, back again to Horseshoe Bay.

[8] The captain of the Tug, Neil Paterson, was a Mercury employee. The driver of the Truck was an employee of C & C. The Judge found as a fact (at para. 53) that "at all material times the [T]ruck was under the control of the driver."

[9] Mr White agreed to pay Mercury on an hourly basis for the use of the Tug and the Barge. Otherwise, they did not discuss the terms and conditions of Mercury's services. The contract was

oral. As the parties intended, Mercury issued no bill of lading for the building materials or the Truck. No mention was made of the HVR. Mr White contracted with Mercury on his own behalf, and not as an agent of C & C. There was no contractual relationship between C & C and Mercury respecting either Mr White's building materials or C & C's Truck.

[10] The invoice issued by Mercury to Mr White on December 14, 2007, stated: "To barging T/A from Horseshoe Bay to Brigade Bay – offload. Standby and barge T/A to Horseshoe Bay": Appeal Book, p. 42. It is agreed that "T/A" refers to the Truck. The invoice then set out the time taken (12.5 hours) and the hourly rate charged for the Tug and Barge respectively. Based on these figures, plus 7% Goods and Services Tax, the invoice stated the amount owed by Mr White to Mercury.

[11] The parties' agreed statement of fact described the contract as follows (at para. 6 of the reasons): "Brian White's contract with Mercury was for the use of the Tug and Barge on an hourly basis." Mr Errington, the owner of Mercury, testified that he had charged Mr White, as he did other customers, on the basis of the number of hours the equipment was available, regardless of whether there was any cargo or not: Appeal Book, pp. 99-100.

[12] From about 2003, a business relationship had developed between Mercury and C & C. When Mercury was asked to carry goods by water, it recommended that the customer use C & C's services for the land portion of the transportation, and *vice versa*. Nearly all of the barge delivery work done by C & C was with Mercury. At one time, C & C billed Mercury for its land transportation services, and Mercury then billed its customers for both the land and water parts of the transportation. By 2007, however, at Mercury's request, C & C billed the customers directly for

its service. The dispute between Mercury and C & C arising from the loss of the Truck in December of that year virtually ended their business relationship.

[13] The day before the Truck arrived at Horseshoe Bay and drove onto the Barge, another of C & C's trucks had delivered Mr White's building materials to Horseshoe Bay and loaded them onto the deck of the Barge. After arriving at Brigade Bay, the driver of the Truck unloaded the building materials from the Barge onto the Truck, using a crane mounted on the Truck. The Truck had to make two trips to carry all the building materials from Brigade Bay to the construction site.

[14] After completing these two trips, the driver of the Truck, under the direction of the captain of the Tug, attempted to back it onto the Barge from the ramp at Brigade Bay. While the Truck's rear wheels were on the Barge and its front wheels still on the ramp, the Barge swung out and caused the Truck to fall into 55 feet of water.

Legislation

[15] Section 41 of the Act defines the HVR, which are contained in Schedule 3. Subsection 43(1) of the Act gives effect to the HVR in Canadian law. Although the HVR apply only to contracts of carriage of goods between countries, subsection 43(2) makes the HVR also applicable in Canadian law to contracts for the carriage of goods by water within Canada. The words of subsection 43(2) that I have underlined identify the requirements for the application of the HVR that C & C says are not met on the facts of the present case.

43. (1) The Hague-Visby Rules have the force of law in Canada in respect of contracts for the carriage of goods by water between different states as	43. (1) Les règles de La Haye-Visby ont force de loi au Canada à l'égard des contrats de transport de marchandises par eau conclus entre les différents

described in Article X of those Rules.	États selon les règles d'application visées à l'article X de ces règles.
(2) The Hague-Visby Rules also apply in respect of contracts for the carriage of goods by water from one place in Canada to another place in Canada, either directly or by way of a place outside Canada, unless there is no bill of lading and the contract stipulates that those Rules do not apply.	(2) Les règles de La Haye-Visby s'appliquent également aux contrats de transport de marchandises par eau d'un lieu au Canada à un autre lieu au Canada, directement ou en passant par un lieu situé à l'extérieur du Canada, à moins qu'ils ne soient pas assortis d'un connaissement et qu'ils stipulent que les règles ne s'appliquent pas.

[16] As already noted, Mercury says that subsection 43(2) of the Act applies the HVR to the contract in this case, and that C & C's action in negligence for the loss of the Truck was out of time by virtue of Article III, paragraph 6 of the HVR, which provides:

Subject to paragraph 6bis the carrier and the ship shall in any event be discharged from all liability whatsoever in respect of the goods, unless suit is brought within one year of their delivery or of the date when they should have been delivered. This period may, however, be extended if the parties so agree after the cause of Action has arisen.	Sous réserve des dispositions du paragraphe 6bis, le transporteur et le navire seront en tout cas déchargés de toute responsabilité, à moins qu'une Action ne soit intentée dans l'année de délivrance des marchandises ou de la date à laquelle elles eussent dû être délivrées. Ce délai peut toutefois être prolongé par un accord conclu entre les parties postérieurement à l'événement qui a donné lieu à l'Action

[17] Article IV*bis*, paragraph 1 of the HVR provides that carriers' defences contained in the HVR are not limited to actions in contract.

1. The defences and limits of liability provided for in these rules shall apply in any action against the carrier in respect of loss or damage to goods covered by a contract of carriage whether the action be founded in contract or in tort.	1. Les exonérations et limitations prévues par les présentes règles sont applicables à toute action contre le transporteur en réparation de pertes ou dommages à des marchandises faisant l'objet d'un contrat de transport, que l'action soit fondée sur la responsabilité

contractuelle ou sur une responsabilité extracontractuelle.

Decision of the Federal Court

[18] The Judge agreed with C & C that subsection 43(2) of the Act did not extend the application of the HVR to the facts of this case. However, he based his decision on a ground that had not been argued before him, namely that the contract respecting the transportation of the Truck was oral and Mercury, as the carrier, had issued no bill of lading.

[19] Counsel for both parties agreed that the Judge was wrong in saying that subsection 43(2) of the Act limits the application of the HVR to written contracts. Counsel for Mercury also argued that the Judge had erred in stating that the HVR did not apply because no bill of lading had been issued. Counsel submitted that, properly interpreted, subsection 43(2) provides that the HVR apply to a contract for the carriage of goods by water within Canada, unless there is no bill of lading and the contract provides that the HVR do not apply. In the present case, since no bill of lading had been issued, the first statutory condition was satisfied. However, the second condition was not, because the contract between Mercury and C & C did not expressly exclude the HVR.

[20] In oral argument, counsel for C & C agreed that the Judge was wrong to hold that the HVR did not apply in the absence of a bill of lading, if the contract did not also expressly exclude them.

[21] I need say no more about this issue, since I have concluded on another ground that the HVR do not apply on the facts of the present case. I would only note that when a judge is minded to take

the unusual step of deciding a case on a basis that was not argued by counsel, the judge should normally advise the parties accordingly, and invite them to make submissions on the issue before rendering judgment. Fairness requires no less: *Rodaro v. Royal Bank of Canada* (2002), 59 O.R. (3d) 74 (C.A.) at paras. 60-61.

[22] Having found in favour of C & C on a ground that had not been argued, the Judge did not address the arguments that had been advanced by counsel for C & C in support of its position that the HVR do not apply to the present facts. Accordingly, this Court must decide them *de novo*. In my view, the Court is able to make the determinations necessary to dispose of the appeal on the bases of the written record and the oral submissions of counsel.

[23] In order to succeed in this appeal, Mercury must establish that all the conditions in subsection 43(2) of the Act have been met. If any one is not satisfied, the HVR do not apply, and Mercury's appeal must be dismissed. For the convenience of the reader, I reproduce the subsection again.

43. (2) The Hague-Visby Rules also apply in respect of contracts for the carriage of goods by water from one place in Canada to another place in Canada, either directly or by way of a place outside Canada, unless there is no bill of lading and the contract stipulates that those Rules do not apply.	43. (2) Les règles de La Haye-Visby s'appliquent également aux contrats de transport de marchandises par eau d'un lieu au Canada à un autre lieu au Canada, directement ou en passant par un lieu situé à l'extérieur du Canada, à moins qu'ils ne soient pas assortis d'un connaissement et qu'ils stipulent que les règles ne s'appliquent pas.

[24] I can deal briefly with two arguments advanced by C & C to support its position that the facts of this case do not fall within the terms of subsection 43(2) and that the HVR therefore do not apply.

[25] First, counsel said, since there was no contract between Mercury and C & C respecting the Truck, there could be no "contract for the carriage of goods" as required by subsection 43(2) for the HVR to apply. I disagree.

[26] It is true that there was no contract between Mercury and C & C. However, there was a contract between Mercury and Mr White for barging the building materials and the Truck. That the Truck belonged to C & C, not Mr White, is immaterial for this purpose.

[27] I would also note that if the HVR apply, paragraph 6 of Article III is broadly framed, and does not confine the one-year limitation period to actions for breach of contract brought against the carrier by the shipper. Indeed, paragraph 1 of Article IV*bis* expressly provides that the defences to and limits on carriers' liability contained in the HVR apply to any actions against the carrier in respect of damage to or the loss of goods covered by a contract for the carriage of goods whether "the action is founded in contract or tort".

[28] Second, subsection 43(2) only applies to contracts for the carriage of goods "from one place in Canada to another place in Canada". Counsel for C & C argued that the contract respecting the Truck was for Mercury to transport it to Brigade Bay and then to bring it back to Horseshoe Bay. In other words, since the contract was not to take it to Brigade Bay and leave it there, but to bring it back to where the voyage had started, the contract was not to take it "from one place in Canada to another place in Canada". Hence, he said, the contract fell outside the definition in subsection 43(2) of the scope of the application of the HVR in Canadian law to contracts for the carriage of goods within Canada.

[29] I cannot accept this argument. I agree with counsel for Mercury that this is an unduly formalistic interpretation of subsection 43(2). Counsel for C & C could suggest no statutory purpose that would be served by excluding contracts for a round trip from the HVR. Further, if Mr White had made one contract with Mercury for the carriage of the Truck from Horseshoe Bay to Brigade Bay, and another for the journey back to Horseshoe Bay, each would be a contract of carriage "from one place in Canada to another place in Canada" to which the HVR could potentially apply. In my view, to distinguish in this context between a single contract for a round trip, and two contracts for two one-way voyages makes no sense.

[30] However, I agree with counsel for C & C that Mercury has failed to establish that its contract with Mr White was a contract for the carriage of goods within the meaning of subsection 43(2), rather than a contract for the charter of the Tug and Barge. On this basis, counsel submitted, C & C's action was not subject to the HVR, including the one-year limitation period.

[31] The starting point for the analysis of this issue is the decision of this Court in *Canada Moon Shipping Co. Ltd. v. Companhia Siderurgica Paulista-Cosipa*, 2012 FCA 284 at paras. 77-79 (*The Federal EMS*). Writing for the Court, Justice Gauthier held that the term "contract for the carriage of goods by water" in section 46 of the Act does not include a contract for the charter of a vessel.

[32] Counsel for Mercury pointed out that the issue in *The Federal EMS* concerned section 46 of the Act, which permits a claimant, in certain circumstances, to institute proceedings in a court or arbitral tribunal in Canada, despite a clause in the contract stipulating that the adjudication of claims arising under the contract shall be adjudicated in a place other than Canada. He argued that the

purpose of section 46 was to curb the commercial power of carriers to dictate to shippers onerous arbitration clauses, a power not possessed by charterers when entering into a charter party. Since this is not the mischief at which subsection 43(2) is aimed, it should not be interpreted like section 46 as excluding charter parties.

[33] I do not agree. First, Parliament is presumed to use language consistently, so that the same words in a statute are presumptively intended to have the same meaning. This presumption is particularly difficult to rebut when the words appear relatively close together in a statute: see Ruth Sullivan, *Sullivan on the Construction of Statutes* 5th ed. (Markham, Ontario, 2008: LexisNexis Canada Inc., 2008) at 214-16. The term "contract for the carriage of goods by water" appears in sections 43, 45 and 46 of the Act. I would have thought that the legal nature of the term would also tend to strengthen the presumption.

[34] Second, in *The Federal EMS* Justice Gauthier did not limit her interpretation of contracts for the carriage of goods by water to section 46. Thus she said (at para. 57):

> It is important to note that none of the international regimes discussed above [including the HVR] regulate the rights and obligations to a charter-party. They all specifically mention that the rules will essentially only come into play when a distinct contract for the carriage of goods exists or "springs to life", for example through the endorsement of a bill of lading between a carrier and a person who is not a party to a charter-party.

[35] That Justice Gauthier's interpretation of contracts for the carriage of goods was not limited to section 46 is further evident from the following paragraphs of her reasons:

> [77] As acknowledged by the Judge at paragraph 72 of his reasons, the ordinary (more accurately, the dictionary meaning) of "carriage of goods by water" could

> include charter-parties because all such contracts are ultimately entered into in order "to convey goods" by water.
>
> [78] That said, in the context of legislation dealing with the rights and obligations of common carriers and which implements international rules, I am satisfied that this expression would not and should not be understood to include charter-parties.
>
> [79] This legal conclusion is consistent with commercial reality. Charter-parties are contracts between commercial entities dealing directly with each other, whose execution and enforcement are the private concern of the contracting parties. There is no policy reason why such actors should not be held to their bargains.
>
> [80] To reiterate, considering the general purpose of part V and the mischief that section 46 was meant to cure (that is, boilerplate jurisdiction and arbitration clauses dictated by carriers to the detriment of Canadian importers or exporters who became parties to such contracts), and the different commercial reality that lead to the conclusion of charter-parties, the Judge's conclusion that the voyage charter-party under review is not covered by subsection 46(1) is correct.

Earlier in her reasons (at para. 55), she had stated that the Act had been adopted "to consolidate all Canadian legislation dealing with marine liability."

[36] For these reasons, I have concluded as a matter of statutory interpretation that a contract for the carriage of goods in section 43 does not include a charter-party.

[37] Mercury has not established that the contract between it and Mr White was a contract for the carriage of goods, rather than a charter-party. Indeed, what little evidence there is in the appeal record about the terms of the contract suggests that the contract might well have been a charter-party: that is, a contract for the hire of the Tug and the Barge, rather than for the carriage of goods.

[38] First, in the agreed statement of fact, Mercury and C & C state that Mr White's contract was "for the use of the Tug and Barge on an hourly basis". Second, Mr Errington, the owner of Mercury,

testified that customers, including Mr White, were charged by the hour for the use of a barge "whether or not there is cargo in the barge" (emphasis added). Third, in the invoice sent by Mercury to Mr White for barging the Truck from Horseshoe Bay to Brigade Bay and back to Horseshoe Bay, the amount owing was based on an hourly rate for the 12.5 hours taken for the voyage, including the time for the off-load and standby (presumably while the Truck drove the building materials from Brigade Bay to the construction site).

[39] On the other hand, standard contractual conditions printed on the back of the invoice could be indicative of a carriage of goods. However, counsel did not take us through the barely legible copy of them included in the Appeal Book.

[40] If the Tug and Barge were chartered to Mr White, it is irrelevant whether the contract was a time charter or a voyage charter because Justice Gauthier said both were excluded from the term "contract for the carriage of goods" in the Act. I would infer from what limited evidence we have about the terms of the contract in the present case that if the contract was one of charter, it may well have been a "hybrid" or "time trip" charter: that is, a charter for the time that it took for the Tug and the Barge to complete the round trip between Horseshoe Bay and Brigade Bay, including the time spent at Brigade Bay while the building materials were off-loaded by the Truck and transported to the construction site: see Coghlin, Terence *et al*, *Time Charters*, 6th ed. (London: Informa Law, 2008) at 1.16-17, 4.99-103; Eder, Sir Bernard *et al*, *Scrutton on Charterparties and Bills of Lading*, 22nd ed. (London: Thomson Reuters, 2011) at 83, note 33.

[41] A final indication that the contract was not for the carriage of goods, at least as far as the Truck was concerned, is the Judge's finding of fact (at para. 53) that "at all material times" the Truck was under the control of its driver, a C & C employee. This is relevant to determining the nature of the contract between Mercury and Mr White because a contract for the carriage of goods by sea is a combined contract for both bailment and transportation, under which carriers accept goods into their possession: *Barclays Bank Ltd. v. Commissioners of Customs and Excise*, [1963] 1 Lloyd's Rep. 81 (Eng, C.A.) at 88, *per* Diplock, L.J. It follows from the finding of the Judge in the present case regarding the control of the Truck that it was not delivered into the possession of Mercury as bailee and was therefore not the subject of a contract of carriage.

[42] Although noting that the captain of the Tug, a Mercury employee, directed the driver in his movement of the Truck in getting it onto and off the Barge, counsel for Mercury did not argue that the Judge had made a palpable and overriding error in his factual finding that the Truck was under the control of the driver at all material times.

[43] I might not have made the same finding as the Judge on this issue. However, given appellate courts' reluctance to reverse trial judges' findings of fact, and the totality of the evidence before the Judge in this case, I am not prepared to conduct my own review of the evidence to determine if the finding constituted a palpable and overriding error.

[44] In short, in light of the meagre evidential record, Mercury has not discharged its burden of establishing on a balance of probability that its contract with Mr White was a contract for the carriage of goods, rather than a contract for the hire of the Tug and the Barge. Accordingly, I am not

persuaded that Parliament can be taken to have intended this contract to fall within subsection 43(2) so as to subject Mr White's statement of claim to the one-year limitation period contained in Article III, paragraph 6 of the HVR.

[45] In view of this conclusion, I need not address the difficult issue raised by counsel for C & C as to whether, given its function in assisting in the transportation of the building materials both on and off the Barge, the Truck constituted "goods" for the purpose of the term "contract for the carriage of goods" in subsection 43(2) of the Act.

Conclusions

[46] For these reasons, I would dismiss Mercury's appeal with costs.

"John M. Evans"
J.A.

"I agree
Eleanor R. Dawson J.A."

"I agree
David Stratas J.A."

FEDERAL COURT OF APPEAL

NAMES OF COUNSEL AND SOLICITORS OF RECORD

DOCKET:	A-326-12

(APPEAL FROM AN ORDER OF THE HONORABLE MR. JUSTICE HUGHES DATED JUNE 12, 2012, FILE NO. T-2018-09)

STYLE OF CAUSE:	The Owners and all others interested in the Ship "Mercury IV", Mercury Launch & Tug Ltd. and Neil Patterson v. The Owners and all others interested in the Barge "MLT-3" also know as the "Bell Copper No. 3", Wells Fargo Equipment Finance Company, C & C Machine Movers and Warehousing Inc. and Cosulich Group Investments Inc.
PLACE OF HEARING:	Vancouver, British Columbia
DATE OF HEARING:	February 6, 2013
REASONS FOR JUDGMENT BY:	EVANS J.A.
CONCURRED IN BY:	DAWSON, STRATAS JJ.A.
DATED:	April 10, 2013

APPEARANCES:

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